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FLORIDA CONSTITUTIONAL LAW

BARRY N. SEMET*

The following outline generally illustrates the materials discussed in the five preceding *Surveys* of Florida constitutional law. The present article analyzes selected decisions disposing of Florida constitutional issues; interpretations of federal constitutional law by the Florida courts are generally omitted. The cases analyzed in this *Survey* are reported in volumes 132 through 160, inclusive, of the Southern Reporter, second series. The following subjects have been transferred, in whole or in part, to other authors in the Sixth Survey of Florida Law: civil and criminal courts in relation to procedural due process, and criminal law procedures and requirements.

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I. SEPARATION OF POWERS

This section will be organized, as are the Florida decisions, into the traditional fields of power. Article II of the Florida Constitution divides the total Florida governmental power into three departments: the legislative, executive and judicial departments.

A. Judicial Power

It is within the power of the chancery courts to strike down as invalid assessments which are arbitrary, excessive and discriminatory.¹ However, the power to tax is a legislative function and a chancellor may not revalue and reassess property. The question of the extent of the chancellor's power in tax matters² arose when a taxpayer protested Dade County's valuation and assessment of his property. The chancellor approved the tax assessor's valuation of the taxpayer's land and personal property for 1959, but disapproved the assessor's valuations of improvements on this property and substituted therefor the assessor's 1958 valuation.

A grand jury report recommended that attorneys who were closely related by blood or marriage to members of the judiciary refrain from practicing before their relatives. One of six judges in the judicial circuit in which the grand jury acted, apparently believing that the report was directed at him,³ peremptorily adjudged them to be in contempt of court and struck the report from the records of the court. The district court of appeal held that the court had no power to cite the entire grand jury for contempt because of the contents of its report.⁴ The Florida Supreme Court held that since the report was not contemptuous, it was not necessary to reach the question of the power of a circuit judge to cite a grand jury for contempt.⁵ However, the court reminded that the grand jury did not possess unlimited power, and when it had exceeded its power "reasonable corrective measures" could be taken.

1. *Overstreet v. Chatlos*, 135 So.2d 870 (Fla. 3d Dist. 1961).

2. FLA. CONST. art. V, § 6(3); FLA. STAT. § 196.01 (1961).

3. The judge was a nephew and former law partner of an attorney who had appeared before the judge.

4. *Clemmons v. State*, 141 So.2d 749 (Fla. 1st Dist. 1962). The court noted the important functions performed by grand juries, their independent nature and stated that if the power asserted by the trial court were upheld, the voice of the people, represented by the grand jury, would be emasculated.

5. *State v. Clemmons*, 150 So.2d 231 (Fla. 1963).

B. Legislative Power Problems

1. LEGISLATIVE ESTABLISHMENT OF STANDARDS

The Florida courts re-affirmed⁶ the requirement that the legislature, in delegating its power, to agencies or commissions, must establish standards to limit and guide the use of this power. A Florida statute established regulations concerning the make-up of signs advertising public lodging which could be seen from a public highway.⁷ The petitioner was found guilty of inaccurately stating the number of rooms available, failing to employ the proper size lettering on his sign and failing to have the rates advertised in the sign conform with the rates posted in the motel rooms. Relying on an earlier supreme court decision,⁸ the district court of appeal upheld the statute's constitutionality,⁹ stating that the enactment was a form of "social legislation" and that in dealing with this type of legislation, "the legislative power is supreme unless some specific provision of organic law is transgressed."¹⁰

A special act of the legislature enables the Palm Beach County Commission to grant franchises for the collection of garbage and to fix districts in which certain parties could engage in garbage collection.¹¹ The commission received advice from private garbage collectors in determining the boundaries within which franchises for the collection of garbage were to be granted. Despite his failure to apply for a franchise, the defendant continued to engage in the garbage collection business in one of the designated districts. In affirming the lower court's order enjoining the defendant from the continued collection of garbage in the specific districts, the court held that the fact that the commission may have established districts which were identical to those suggested by the private collectors would not render its action unconstitutional since the commission, in its resolution, had exercised its prerogative and performed its duty in accordance with the act.¹²

A Florida statute provides that a license to engage in the occupation of an auto transportation broker may not issue if an applicant has been convicted of engaging in that business without a license.¹³ A transferee of that type of license must meet the same requirements as an original applicant. The Public Utilities Commission prevented the assignment of

6. Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 687 (1962).

7. FLA. STAT. § 509.201(2)(a) (1961), required signs which include rates charged for lodging to indicate, among other things, the number of rooms available and the rates charged therefor, and the dates during which said rates are in effect.

8. *Adams v. Miami Beach Hotel Ass'n*, 77 So.2d 465 (Fla. 1955).

9. *Nugent v. Florida Hotel & Restaurant Comm'n*, 147 So.2d 606 (Fla. 2d Dist. 1962).

10. The petitioner asserted that the statute violated art. 3, § 1 of the constitution.

11. Fla. Laws 1955, ch. 31118.

12. *Grova v. Baran*, 134 So.2d 25 (Fla. 2d Dist. 1961).

13. FLA. STAT. § 323.31(3)(a)(2) (1961).

a broker's license on the ground that the transferee had held itself out as a broker without having previously obtained a license. The supreme court held that since the transferee had not been "convicted" of operating without a license, as required by the act in question, the Commission had no authority to deny the transfer upon its own determination that the criminal laws had been violated.¹⁴

The Commission attempted to support its action based upon a statute which provided that it could impose restrictions on "such transfer where the public interest may be best served thereby."¹⁵ This statute was held unconstitutional on the ground that the delegation by the legislature "was totally devoid of any standards" and conferred unlimited discretion upon the Commission.¹⁶

2. REGULATIONS OF STATE ADMINISTRATIVE AGENCIES

The State Board of Health was authorized by statute to adopt rules and regulations concerning health in the state; the statute contained eleven specific subject areas, and a twelfth which related to the "execution of any other purpose or interest of the laws enacted for the protection of the public health of Florida."¹⁷ Predicated upon this authority, the Board promulgated extensive regulations governing commercial spraying in residential areas with highly toxic pesticides. In holding that the Board had no power to establish these regulations, the court stated that the enactment of these rules demonstrated an "arbitrary attempt" to usurp the powers of the three constitutional branches of government.¹⁸

An attempt to promulgate administrative rules and regulations which go beyond the scope of a board's statutory authority constitutes a violation of constitutional guarantees. The State Board of Funeral Directors and Embalmers was authorized to make rules to carry out the provisions of the law which, by statute, prohibited misleading or inaccurate advertising.¹⁹ One of the Board's rules limited the size of advertisements to three column inches and restricted the contents thereof

14. *Delta Truck Brokers, Inc. v. King*, 142 So.2d 273 (Fla. 1962).

15. FLA. STAT. § 323.31(6) (1963).

16. *Delta Truck Brokers, Inc. v. King*, *supra* note 14.

17. FLA. STAT. § 381.031(1)(g) (12) (1961).

18. *Lewis v. Florida State Bd. of Health*, 143 So.2d 867 (Fla. 1st Dist. 1962). The court stated that the board:

seized control of a private industry without legislative grant; invaded the rights of citizens to engage in this industry; conferred upon itself the power to determine which persons may work in this industry and the power to remove an individual from employment in same; delegated to itself the judicial power of regulating the industry without providing an appeal to the established judiciary; legislated in many instances, including a finding that any person engaging in this lawful industry, without its approval, is guilty of a crime and subject to imprisonment; bestowed upon itself the executive power to appoint what it terms 'an advisory council' and made an appropriation of tax funds for such council's expenses without limitation. *Id.* at 875.

19. FLA. STAT. § 470.12(2)(i) (1961).

to the name, address and telephone number of the advertiser. In affirming the chancellor's ruling that the rule went beyond the Board's statutory authority, the court held that the statute which provides for revocation of a license for misleading and inaccurate advertising limits the rule-making power of the Board. Since the Board could not show that its rule served any purpose of the public health, safety or morals and since it went beyond matters dealing with misleading or defrauding the public, the Board acted without proper authority.²⁰

3. LEGISLATIVE FUNCTIONS

A municipal ordinance exacted a license tax from attorneys having offices within the city limits. Certain attorneys brought suit alleging, *inter alia*, that the ordinance infringed upon the control of the judiciary over the admission to and regulation of the practice of law.²¹ The ordinance was upheld on the basis that the role of the judiciary in regulating the practice of law did not preclude a municipal license tax upon attorneys.²²

II. THE "CLASSIC" FREEDOMS

A. *Speech*²³

1. CIVIL RIGHTS

Picket lines were maintained for a period of eight months at the plaintiff's place of business. The pickets attempted to boycott, and to induce others to boycott, the plaintiff's stores because of his alleged discrimination in failing to employ Negroes in positions above those requiring only menial services. Signs carried by the pickets read as follows: "Qualified Negroes Can't Work Here. Don't Buy At B & B"; "Let's Not Buy At B & B Until We Get Better Jobs." The pickets personally communicated their grievances to prospective customers of the plaintiff and distributed handbills to persons who transacted business with the plaintiff. There was no contention that the picketing was other than peaceful. A permanent injunction against the picketing was affirmed on appeal,²⁴ the court holding that although picketing employs speech,

20. *Grissom v. Van Orsdel*, 137 So.2d 246 (Fla. 3d Dist. 1962). The court distinguished *Fisher v. Schumacher*, 72 So.2d 804 (Fla. 1954), which related to advertising by optometrists, on the ground that optometry constitutes a profession whose code of ethics opposed advertising whereas undertaking or mortuary practice is a business which favors advertising.

21. FLA. CONST. art. 5, § 23.

22. *Sandstrom v. City of Fort Lauderdale*, 133 So.2d 755 (Fla. 2d Dist. 1961). The court also rejected the argument that the tax denied the attorneys the equal protection of the law, holding that it applies to all attorneys who have their offices within the city, notwithstanding its inapplicability to attorneys who use the city's facilities but have their offices outside the municipality.

23. The cases considered in this section which deal with picketing have ramifications extending into the right of assembly, but will be discussed here for convenience and to facilitate comparison.

24. *Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc.*, 151 So.2d 877 (Fla. 2d Dist. 1963).

it is "more than 'free speech' and must be dealt with accordingly."²⁵ The court stated that the plaintiff, in the management of his business, should not be subjected to the coercion of a boycott because of his employment practices.²⁶

In *NAACP v. Webb's City, Inc.*,²⁷ the second district court of appeal was again confronted with a case in which Negroes were picketing a place of business in order to induce a customer boycott. The NAACP was acting not only to provide better employment opportunities but, in addition, to protest lunch counter segregation. However, contrary to the *B & B Cash Grocery* case, in *Webb's City* the chancellor found that the picketing had produced an extremely tense and inflammatory situation. The district court held that the chancellor did not err in permanently enjoining the picketing. In reaching its decision, the court weighed the plaintiff's interest in its commercial expectancies and the injury occasioned by the defendants against the defendants' interest in their social objectives.²⁸

2. LABOR LAW

In several cases, the Florida courts were confronted with the problem created by the "right to work" provision in the state constitution²⁹ and by federal legislation dealing with the rights of organized labor;³⁰ in these cases the issue was the extent of federal pre-emption in the field of labor law.

A builder paid his non-union employees the union wage scale; when he refused to require them to join the union, pickets were placed in front of certain of his model homes. Although there was no showing of violence or an attempt by the union to secure a union closed shop agreement, a restraining order was issued which prohibited the union from performing acts in furtherance of any illegal conspiracy, advertising that the builder was unfair to organized labor, and interfering with the builder's business by intimidation, coercion or threats. Assuming that the builder's business affected interstate commerce, the dis-

25. *Id.* at 878.

26. "The freedom of opportunity to do business is to be protected so long as the means are justified." *Ibid.* The court noted that there was neither a contention nor a showing that a qualified Negro had applied for a "white collar" position, in response to which, the Negro organization suggested that the plaintiff could train persons for various positions.

27. *NAACP v. Webb's City, Inc.*, 152 So.2d 179 (Fla. 2d Dist. 1963).

28. Certiorari was granted by the United States Supreme Court, 84 Sup. Ct. 346 (1963). However, on *Webb's City's* suggestion that the question was moot, the district court of appeal's order was vacated and the case remanded for "appropriate proceedings to effectuate respondent's representations that the injunction below will be set aside, without prejudice to the right of petitioner to move to vacate today's order in the event the injunction is not promptly vacated . . ." 84 Sup. Ct. 635 (1964).

29. FLA. CONST. DECL. OF RIGHTS § 12.

30. Labor Management Relations Act (Taft-Hartley Act) § 1, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1958).

strict court reversed the chancellor's order, stating, in reference to federal pre-emption, that "the state's power in labor relations matters is confined to a prevention of mass picketing, acts of violence and threats of violence."³¹ The court reached this result despite the builder's contention that the failure to enjoin the union's activities would result in a violation of state law and that such violation empowered the state to enjoin the picketing.

Not long after this case was decided, the Florida Supreme Court, in the *Schermerhorn* case,³² held that an agency shop agreement was repugnant to the Florida Constitution. The court held that the constitution affords a workingman the choice of joining or not joining a union without jeopardizing his job because of his decision. An agency shop agreement abrogates this freedom of choice created by the "right to work" provision.³³ The United States Supreme Court held that Congress had made the status of the agency shop agreement a question of state substantive law.³⁴

Following the *Schermerhorn* decision, the first district court of appeal enjoined picketing whose purpose was to force a sub-sub-contractor either to enter into a collective bargaining agreement or lose certain work for which he had contracted. Contrary to the decision of the Third District previously noted, the First District held that picketing, although an aspect of freedom of speech, was subject to reasonable limitation. The picketing must be peaceful and its purpose must be to accomplish a lawful objective. Since the purpose of the picketing in this case was unlawful, it should have been enjoined.³⁵

B. Press

Although the first amendment does not protect "obscene" material, there is no conclusive test for determining what is "obscene."³⁶ The

31. *Wood, Wire & Metal Lathers Int'l Union, Local 345 v. Babcock, Inc.*, 132 So.2d 16, 18 (Fla. 3d Dist. 1961). The court said that a state court could not enjoin "peaceful picketing where it is *arguable* that the activities complained of are within the purview of the Labor Management Relations Act." *Ibid.* (Emphasis added.)

32. *Schermerhorn v. Retail Clerks Int'l Ass'n, Local 1625*, 141 So.2d 269 (Fla. 1962).

33. The court stated that the constitution has made the decision of whether one will avail himself of the benefits of union membership a matter for individual determination and preference, notwithstanding the fact that the union is the bargaining agent for all employees.

34. *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963). The court, however, retained the case on the calendar to consider the question of whether the Florida courts or the National Labor Relations Board had jurisdiction over the subject matter of the action since the matter at issue was an "arguable" unfair labor practice. See note 31 *supra*. The Supreme Court subsequently decided that the Florida courts, rather than solely the National Labor Relations Board, were the tribunals with jurisdiction to enforce the state's prohibition against an agency shop clause in a collective bargaining agreement.

35. *Hescom, Inc. v. Stalvey*, 155 So.2d 3 (Fla. 1st Dist. 1963).

36. *Alloway & Knight, Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 699 (1962).

previous survey raised the question of whether material such as Henry Miller's *Tropic of Cancer* would be considered "obscene."³⁷

A jury determined that the book was "obscene" and predicated upon this finding, the sale and distribution of the book within Dade County and its importation into Florida were enjoined. Citing other jurisdictions which had declared the book "obscene," and applying the "prurient interest" test of the *Roth* case,³⁸ the appellate court affirmed the decree below.³⁹ Although the validity of the Florida obscenity statute⁴⁰ was questioned in the trial court, the appellant chose to waive this argument on appeal.

C. Assembly

Section 509.141 of the Florida Statutes makes it a misdemeanor for a person to refuse to leave a restaurant after being requested to do so. The appellant and others were found guilty of a misdemeanor under this statute. The Florida Supreme Court found the statute to be non-discriminatory and held it to be a valid exercise of the state's legislative power.⁴¹

D. Religion

In *Chamberlin v. Dade County Bd. of Pub. Instruction*,⁴² an action was brought to enjoin certain alleged religious practices⁴³ conducted in the public schools and to have section 231.09 of the Florida Statutes declared unconstitutional.⁴⁴ The plaintiffs argued that the religious prac-

37. *Id.* at n.49.

38. "The test of obscenity is whether the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest, that is to say, arouses lascivious or lustful thoughts." *Tralins v. Gerstein*, 151 So.2d 19, 20-21 (Fla. 2d Dist. 1963), citing *Roth v. United States*, 354 U.S. 476 (1957). The *Tralins* case declared *Pleasure Was My Business* obscene and enjoined its publication.

39. *Grove Press, Inc. v. State ex rel. Gerstein*, 156 So.2d 537 (Fla. 3d Dist. 1963).

40. FLA. STAT. § 847 (1961).

41. *Robinson v. State*, 144 So.2d 811 (Fla. 1963). The United States Supreme Court noted probable jurisdiction, 374 U.S. 803 (1963), and further consideration of the matter was ordered. 84 Sup. Ct. 262 (1963).

42. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So.2d 21 (Fla. 1962).

43. The complaint alleged that the following practices were observed in the public schools:

Regular reading of the Bible; distribution of sectarian literature to school children; after hours Bible instruction; regular recitation of the Lord's Prayer, grace and other sectarian prayers; singing of religious hymns; religious observance of the Christmas, Hannukka and Easter holidays, including instruction in the dogma of the Nativity and Resurrection; display of religious symbols, baccalaureate programs; conducting a religious census and the use of religious tests for employment and promotion of school employees. *Id.* at 23.

44. Section 231.09(2) (1961) provided that the public schools shall "have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment." A resolution of the Dade County Board required children to be excused from attendance upon request of their parents or guardians. The statute was alleged to be violative of the first and fourteenth amendments to the United States Constitution and sections five and six of the Florida Declaration of Rights.

tices violated both the "establishment" and "free exercise" clauses of the federal constitution. The Florida Supreme Court rejected these contentions, and in reference to the "establishment" issue adopted Cooley's view that "establishment" of a religion "meant the setting up or recognition of a state church"⁴⁵ or conferring advantages upon one church and not another. It was never intended that the "'government should be prohibited from recognizing religion . . . where it might be done without drawing invidious distinctions . . .'"⁴⁶ Citing several federal and state court decisions,⁴⁷ the court observed that our institutions pre-suppose the existence of God and to attack this premise is to threaten our existence as a nation. The court also pointed out that if "establishment" of or restriction on the "free exercise" of religion existed, it would be because of compulsion, which, based upon the school board's resolution, did not exist.^{47a} In addition to approving Bible reading, the court held that certain other activities carried on in the public schools were proper.⁴⁸

In a per curiam decision, the Florida court's decision was vacated by the United States Supreme Court and the case was remanded for further consideration in light of *Murray v. Curtlett*⁴⁹ and *School Dist. of Abington Township v. Schempp*.⁵⁰ These cases declared the practice

45. *Chamberlin v. Dade County Bd. of Pub. Instruction*, *supra* note 42, at 25, citing COOLEY, CONSTITUTIONAL LAW 213-14 (2d ed. 1891).

46. *Ibid.* Illinois *ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1947) (Mr. Jefferson's wall of separation between church and state did not exclude religious education at the University of Virginia).

47. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Saia v. New York*, 334 U.S. 558 (1947) (dissent); Illinois *ex rel. McCollum v. Board of Educ.*, *supra* note 46; *Doremus v. Board of Educ.*, 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1951); *Engel v. Vitale*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

47a. See note 44, *supra*.

48. The court approved the following activities: distribution of sectarian literature to school children; recitation of the Lord's prayer, grace and other sectarian prayers; singing of religious hymns; display of religious symbols; baccalaureate programs; conducting a religious census among the students; and the use of religious tests for employment and promotion of school employees. It enjoined the following: sectarian comments on the Bible by school teachers; use of school premises for after school hours Bible instruction; exhibition of films with religious content; and religious observance in the schools of Christmas, Easter and Hannukkah.

49. 374 U.S. 203 (1963). In this case, the Board of School Commissioners of Baltimore City adopted a rule which provided for the "holding of opening exercises in the schools of the city, consisting primarily of the 'reading without comment, of a chapter in the Holy Bible and/or the use of the Lord's prayer.'" *Id.* at 211. In practice, verses were read from the King James version of the Bible. Children were permitted to be excused from the exercise at their parents' request.

50. 374 U.S. 203 (1963). In this case, a state statute required that:

At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian. 24 PA. STAT. § 15-1516, as amended, Pub. Law 1928 (Supp. 1960).

In practice, the reading of these verses was followed by a recitation of the Lord's Prayer. Students read the verses which they were free to select. Although the school furnished only the King James version of the Bible, verses had been read from the Douay and Revised Standard versions of the Bible, and the Jewish Holy Scriptures.

of requiring the reading of the Bible in public schools to be violative of the "establishment" clause of the first amendment as applied to the states under the fourteenth amendment. Predicated upon a series of earlier cases,⁵¹ the Court's position was, in essence, that the states may assume only a position of neutrality between governmental and religious functions.⁵²

In the course of its opinion,⁵³ the Court stated "that to withstand the strictures of the Establishment Clause, there must be a *secular* legislative purpose and a primary effect that neither advances nor inhibits religion."⁵⁴ (Emphasis added.) When the *Chamberlin* case was remanded, the Florida Supreme Court, in reviewing the statute in question,⁵⁵ stated that it "was founded upon secular rather than sectarian considerations . . ." and therefore did not violate the "establishment" clause. The court noted that the United States Supreme Court did not consider the issues concerning baccalaureate programs, religious census among students and religious tests as a qualification for employment of teachers,⁵⁶ and in addition, the appellants did not have standing to raise these issues. In reaffirming its previous decision, the court held that the statute was designed to require moral training with only a secondary emphasis on religious matter, and that the "establishment" clause was never intended to proscribe the practices in question. Further, because of the dissimilarity between the *Murray* and *Schempp* cases and the subject case and the divergent views contained in the Supreme Court opinion, the Florida court stated that it could not find a clear course to follow.⁵⁷

III. SUBSTANTIVE DUE PROCESS

Substantive due process concerns the power of the government to take or regulate life, liberty or property. This constitutional inhibition does not relate to the procedures necessary to take or regulate, but involves the validity of the exercise of the governmental power as such.

51. It is interesting to note that the diametrically opposed views of the Florida court and the national Supreme Court were predicated upon basically the same cases. Further, both courts recognized the important role which religion has assumed in our society, both historically and in the modern world.

52. "[T]he establishment clause has . . . [withdrawn] all legislative power respecting religious belief or the expression thereof." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963).

53. The Court noted that the test for determining the validity of legislation dealing with the relative position of government and religion was: "what are the purposes and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *School Dist. of Abington Township v. Schempp*, *supra* note 52, at 222.

54. *Ibid.*

55. *Chamberlin v. Dade County (Bd.) of Pub. Instruction*, 160 So.2d 97, 99 (Fla. 1964).

56. See note 48 *supra*.

57. The United States Supreme Court denied a motion to vacate its judgment, 84 Sup. Ct. 28 (1963), and also denied a petition for rehearing. 85 Sup. Ct. 18 (1964).

The Florida Supreme Court treats substantive due process as a problem relating to the scope of the state's "police power." In order to be valid, an exercise of the "police power" must be related to the "health, safety, morals or general welfare" of the citizens of Florida.

A. *Spending, Disposing and Borrowing Powers*

Article IX, section 10 of the Florida Constitution provides that:

The credit of the State shall not be pledged or loaned to any individual, company, corporation or association The Legislature shall not authorize any county, city, borough, township or incorporated district . . . to obtain or appropriate money for, or loan its credit to, any corporation, association, institution, or individual.

This section has been used by the Florida Supreme Court "as a vehicle to articulate the so-called public purpose doctrine (*i.e.*, the state must tax, spend, etc. for a public, as opposed to a private, purpose)"⁵⁸

In *State v. Clay County Dev. Authority*,⁵⁹ the Authority had acquired a surplus airfield consisting of approximately 1300 acres. The Authority entered into a contract with a private company whereby the Authority agreed to construct, erect, install and equip an industrial plant on a portion of the field in return for the company's entering into a lease for the property. Revenue anticipation certificates were to be issued to finance the cost of the project. The term of the lease was sixteen years and the company had an option to renew it for an additional ten years. During the term of the lease, the company was to have exclusive use of and control over the premises.

In reversing the lower court's decree validating the revenue certificates, the supreme court held that the plan was violative of the constitutional proscription against the lending of credit by a county. Noting that the only possible public purpose would be the promotion of employment, the court stated that the dominant and paramount purpose was to finance a private enterprise for private profit, despite the fact that only a small portion of the 1300 acres was being used. If the constitutional provision against lending credit is not to be violated, the proposed plan concerning private enterprise must be a "pure incident" of a municipal project and it must not destroy the "main or primary public purpose."

In his dissenting opinion, the late Mr. Justice Terrell noted that the court's action was in direct conflict with the *Cotney*⁶⁰ decision in

58. Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 711 (1962).

59. 140 So.2d 576 (Fla. 1962).

60. *State ex rel. Ervin v. Cotney*, 104 So.2d 346 (Fla. 1958). In this case, the court upheld the statute which created the authority.

which, in his view, the court had approved the very action which the Authority had attempted to take in the present case. He pointed out that in the *Cotney* case, the court expressly approved the Authority's power to lease "portions of surplus land 'to private concerns as sites for industrial or commercial plants,'"⁶¹ and that the proposed project was merely an incident to the public purpose recognized and approved in *Cotney*.⁶²

B. Zoning

With respect to substantive due process, zoning officials are vested with a rather broad discretionary power in promulgating their orders and regulations. Although the basic issue in determining the validity of zoning ordinances concerns the question of their "reasonableness," the ordinances are clothed with a presumption of validity which must be overcome by the one attacking the validity of the regulation. Furthermore, when the question of reasonableness is "fairly debatable," the courts will not substitute their judgment for that of the zoning officials.⁶³

In *Abdo v. City of Daytona Beach*,⁶⁴ a municipal ordinance prohibited the use of outdoor signs in advertising rates for accommodations in motels, hotels, and other types of lodgings. The evidence was in conflict concerning the effects of the signs advertising room rates. Motel owners testified that the signs were essential to the operation of their businesses, while other witnesses testified that the signs were detrimental to the aesthetics of the area and, in general, adversely affected the economy of the area. Relying upon *Sunad, Inc. v. City of Sarasota*,⁶⁵ and recognizing that aesthetics constitute a factor to consider in determining the validity of such an ordinance, the court held that the true basis for the chancellor's determination that the ordinance was valid was the economic impact of the signs rather than aesthetic considerations, and that the economic impact alone was not a sufficient basis upon which to sustain such discriminatory legislation.⁶⁶

*Eskind v. City of Vero Beach*⁶⁷ presented the same problem at

61. *State v. Clay County Dev. Authority*, *supra* note 59, at 583 (dissenting opinion).

62. In *Wiggins v. City of Green Cove Springs*, 159 So.2d 219 (Fla. 1963), the supreme court upheld the validation of bonds, the proceeds of which were to be used to purchase a deactivated naval station. The city intended to use the station to expand its utilities system and as an incident to this main public purpose, intended to lease portions of the station which were not essential to municipal purposes.

63. Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 713 (1962).

64. 147 So.2d 598 (Fla. 1st Dist. 1962).

65. 122 So.2d 611 (Fla. 1960). See Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685 (1962), for a discussion of this case.

66. The court pointed out that the ordinance did not attempt to regulate all signs relating to prices of all businesses within the city and that aesthetically, it could find no distinction between signs advertising rates of other products, for example, gasoline, and those advertising room rates.

67. *Eskind v. City of Vero Beach*, 150 So.2d 254 (Fla. 2d Dist. 1962).

issue in the *Abdo*⁶⁸ case. A Vero Beach ordinance similarly prohibited the use of outdoor signs in advertising rates for accommodations. The second district court of appeal upheld the validity of the ordinance, finding that its passage was prompted by economic and aesthetic considerations which could not be validly separated since they were closely interwoven with one another. Sufficient evidence was adduced to establish a reasonable relationship between the ordinance and the economic health of one of the community's major industries and, hence, to the general welfare of the community.⁶⁹

Faced with this conflict in decisions, the supreme court of Florida considered the issue presented and held that the *Abdo* decision was correct and that the *Eskind* decision was in error to the extent that it upheld the ordinance on aesthetic grounds.⁷⁰ The court could find no basis for distinction, aesthetically speaking, between signs advertising room rates in motels and other types of signs.

To sustain its exercise of police power, the city pointed out that if less attractive establishments were permitted to advertise their low rates, this would drive tourists from the luxury motels, which would not offer accommodations at the low rates, and this, in turn, would affect the city's operating income. In rejecting this argument, the court stated that the exercise of the police power must be for the purpose of promoting the general welfare of the community. It cannot be used to damage one segment of a business to the advantage of another when the former is employing a legitimate business practice which provides it with a competitive advantage.⁷¹

In addition to the substantive due process limitation, zoning ordinances may not be so discriminatory as to deny the equal protection of the laws.⁷² A Dade County ordinance required package stores in unincorporated areas to be 1500 feet from other package stores, but package stores licensed under an exception for shopping centers were

68. In the *Eskind* case, the court's attention was directed to the *Abdo* opinion which at that time had not become final. However, the *Eskind* court followed the *Sunad* case, noting that the *Abdo* decision did not follow *Sunad*.

69. The effect on the aesthetic sense of tourists, and not those of the inhabitants, was to be the determinative factor. As to the distinction which the court in the *Abdo* case could not find between advertising the price of gasoline and lodging, the court in this case believed that the purchaser of lodging would be more concerned with the appearance at the point of sale than would the purchaser of gasoline. In reaching its decision, the court relied in part on an earlier decision in *City of Daytona Beach v. Abdo*, 112 So.2d 398 (Fla. 1st Dist.), cert. denied, 118 So.2d 540 (Fla. 1960), which reversed a summary final decree in favor of the plaintiff and remanded the cause for the taking of testimony.

70. *Eskind v. City of Vero Beach*, 159 So.2d 209 (Fla. 1963).

71. "We have the view that the subject ordinance is nothing less than an attempted exercise of the police power to restrict competition between favored and unfavored segments of the same business activity. *Id.* at 212.

72. FLA. CONST. DECL. OF RIGHTS § 1.

required to be at least 2500 feet from another package store. This provision was declared invalid as a denial of equal protection.⁷³

Vested rights do not accrue to landowners so as to require that zoning classifications remain constant.⁷⁴ Although changes in the character and use of an area occurring after a zoning ordinance has been enacted often form the basis for an alteration of zoning limitations, such changes are not necessarily the prerequisite for changes in zoning.⁷⁵ In *Sarasota County v. Walker*,⁷⁶ a landowner sought to have his property rezoned from multiple dwelling to commercial. His property was bounded on the north by commercially-zoned property, on the south and east by a non-conforming trailer park, and on the west by commercial business. A prospective purchaser of the property intended, if it were rezoned, to erect an automobile agency containing an automobile body shop as a part of a complete mechanical garage. Over objections voiced by adjoining property owners, the rezoning was approved by the County Planning Commission and the County Commission. On certiorari, the circuit court quashed the rezoning resolution, holding that in order to justify rezoning, there must be a change in the area or a showing that the purpose of the rezoning is either to revoke or modify zoning which is shown to be unwise or to correct an existing injustice. Since neither of the facts was shown to exist, the "fairly debatable" rule was inapplicable.

The second district court of appeal reversed this order, holding that the factors relied upon by the trial court constituted a legitimate, but not all inclusive, cause for rezoning. Noting that the local authorities were in the best position to consider all the factors surrounding the issue, and employing the ruling in the *Oka* case,⁷⁷ the court held that the County Commission had "determined at least a fairly debatable question."⁷⁸

73. *Dade County v. Keyes*, 141 So.2d 819 (Fla. 3d Dist. 1962).

74. *Oka v. Cole*, 145 So.2d 233 (Fla. 1962). See *City of Miami v. State ex rel. Ergene, Inc.*, 132 So.2d 474 (Fla. 3d Dist. 1961), which deals with the vesting of rights in connection with the issuance of a zoning variance.

75. *Ibid.*

76. 144 So.2d 345 (Fla. 2d Dist. 1962).

77. Note 74 *supra*.

78. In accord with the fairly debatable rule, and citing an earlier supreme court case, the court pointed out that on certiorari, the court's function is not to re-weigh or evaluate the evidence. Rather, it should examine the record to determine "whether the lower tribunal had before it competent substantial evidence to support its findings. . . ." *Sarasota County v. Walker*, 144 So.2d 345, 347 (Fla. 2d Dist. 1962), citing *DeGroot v. Sheffield*, 95 So.2d 912, 915 (Fla. 1957).

C. *Eminent Domain*⁷⁹

An early Florida case⁸⁰ held that an increase in value of lands occurring in anticipation of a proposed improvement was an element of the compensation to be paid for lands taken. In *State Road Dep't v. Chicone*,⁸¹ the second district court of appeal held that the trial court was not in error in granting a new trial to the defendant-condemnee after the court had permitted the State Road Department to introduce evidence of the value of the defendant's land as "depressed" or "discounted" by the imminence of the taking of the parcel in question. The district court rejected the road department's contention that under the authority of the *Sunday* case "a jury shall consider the *economic effect* of an impending improvement upon the value of property taken."⁸² (Emphasis added.)

On certiorari to the Florida Supreme Court, the department alleged a direct conflict between the district court's decision and the *Sunday* case.⁸³ The supreme court rejected the department's contention holding that the *Sunday* case dealt only with an increase in value occurring in anticipation of a proposed improvement. Recognizing that the converse of this rule might be adopted, the court pointed out what it considered to be a vital distinction between the *Sunday* case and the case under consideration. The former dealt with the effect on value caused by anticipation of a proposed public improvement whereas in the latter, the issue was the effect on the value of land of the imminence of its being taken. In the situation involved in the *Sunday* case, there was the possibility of an increase in value; however, in the *Chicone* case the prospects of other than a decrease in value were most remote.

Noting that existing Florida law required compensation to be determined at the time of lawful appropriation,⁸⁴ the court stated that strict application of the rule in this case would mean that the compensation would be determined at a point in time at which the property had already been depreciated by the prospect of condemnation. A public

79. Two provisions in the Florida Constitution, DECL. OF RIGHTS § 12 and art. 16, § 29, deal with the proscription that private property shall not be taken without just compensation. See *Alford v. Finch*, 155 So.2d 790 (Fla. 1963) and *Dudley v. Orange County*, 137 So.2d 859 (Fla. 2d Dist. 1962), which consider the distinction between a constitutional "taking" and "regulation" through the exercise of the police power; and *Bair v. Central & So. Fla. Flood Control Dist.*, 144 So.2d 818 (Fla. 1962), which dealt with the eminent domain problem in the context of an ad valorem tax which was uniform throughout the taxing district.

80. *Sunday v. Louisville & Nashville Ry.*, 62 Fla. 395, 57 So. 351 (1912).

81. 148 So. 2d 532 (Fla. 2d Dist. 1962).

82. *State Rd. Dep't v. Chicone*, *supra* note 81, at 533.

83. *State Rd. Dep't v. Chicone*, 158 So.2d 753 (Fla. 1963).

84. *Yoder v. Sarasota County*, 81 So.2d 219 (Fla. 1955). The district court in the instant case had held that where value is depreciated because of the imminence of the taking, compensation is not to be fixed as of the time of taking but rather, at a time prior to the effect of the prospect of condemnation.

announcement indicating the parcels to be taken had been made three years prior to the filing of suit to acquire the property. The court held that the depreciated value at the time of taking was not the proper basis by which to determine compensation. Rather, compensation is properly based on the value of property as it *would* be at the time of taking if it had not been subjected to the threat of condemnation. To hold otherwise would violate state and federal constitutional guarantees of adequate and fair compensation for property taken.

The Florida Statutes⁸⁵ provide a procedure whereby property may be taken at the outset of the condemnation proceeding if a deposit is made in an amount which the court determines will fully compensate the owners; this amount may not be less than one hundred per cent of the value as fixed by court appointed appraisers. In *Bainbridge v. State Road Dep't*,⁸⁶ after a jury awarded a verdict which was less than the amount fixed in the order of taking, the landowner asserted that the verdict should be set aside as contrary to the manifest weight of the evidence. The district court held that such a ruling would violate the constitutional and statutory requirements that compensation be fixed by a jury of twelve men and would enable the condemnor, and not the jury, to determine the minimum compensation.

In two cases, the courts took steps to insure that the constitutional requirement of "fair compensation" would be satisfied. The supreme court held that documents affecting the value of condemned land which are in the possession of the State Road Department, including appraisers' worksheets, are subject to discovery despite the fact that in private litigation, experts' work product is exempt from compulsory discovery.⁸⁷ Cost incurred in a supplemental proceeding to determine the interests⁸⁸ of claimants in the compensation awarded, which must be paid by the petitioner, may not be deducted from the award, for to do so would yield to the owner of the condemned property less than full and just compensation.⁸⁹

D. Health

Although administrative agencies have been afforded a wide range of discretion by the courts in the latter's determination of the validity of regulations dealing with the public health, such regulations must ac-

85. FLA. STAT. § 74 (1961).

86. 139 So.2d 714 (Fla. 1st Dist. 1962).

87. *Shell v. State Rd. Dep't*, 135 So.2d 857 (Fla. 1961).

88. See *State ex rel. Ervin v. Jacksonville Expressway Authority*, 139 So.2d 135 (Fla. 1962), which held that pursuant to statutory authority, less than a fee simple interest could be condemned.

89. *Orange State Oil Co. v. Jacksonville Expressway Authority*, 143 So.2d 892 (Fla. 1st Dist. 1962).

cord with the substantive due process standard of a reasonable relation to the health of Florida's citizens.⁹⁰

The Florida Board of Pharmacists promulgated a regulation which prohibited licensed pharmacists or owners of retail drug stores from advertising the name or price of tranquilizing drugs or antibiotics which could be purchased and dispensed only by prescription. The Board's findings indicated that the regulation's purpose was to relieve physicians from pressures, which would result from advertisement, to prescribe these drugs. Noting that the findings of the Board purported to deal with the welfare of physicians, the court invalidated the regulation, holding that it was an unreasonable intrusion upon private rights and completely lacking in public benefits.⁹¹ The court stated that the regulation appeared to be an economic regulation prohibiting price competition rather than an effort to protect the public health.⁹²

A case which demonstrated the wide discretion accorded officials connected with matters bearing on the public health was *North Broward Hosp. Dist. v. Mizell*.⁹³ Pursuant to statutory authority to revoke the licenses and privileges of staff members to practice in hospitals maintained under the Act "so that the welfare and health of patients and the best interests of the hospital may be served,"⁹⁴ the governing board of a hospital adopted a bylaw which provided that the hospital board could remove any member of the medical staff or deprive any physician of the privileges of the hospital "whenever in *their sole judgment* the good of the hospital or the patients therein may demand it."⁹⁵ The court held that the statute adequately provided a standard by which board actions could be measured. This conclusion was influenced by the difficulty encountered in establishing precise definitions of professional fitness⁹⁶ and the fact that the possible danger to human life often is involved in the ultimate decision of the hospital board.⁹⁷

90. Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 719 (1962).

91. *Stadnik v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962).

92. *McMillan v. Nave*, 138 So.2d 93 (Fla. 3d Dist. 1962), presented a similar though unarticulated problem. In this case, the court invalidated an order to the Barber's Sanitary Commission which attempted to prevent licensed barbers from working more than nine and one half hours within a twenty-four hour period.

93. 148 So.2d 1 (Fla. 1962). The case dealt with the problem of the delegation of legislative power and the requirement that adequate standards be established by the legislature. Although it might be more appropriate to note this case in this survey's section dealing with Legislative Power Problems, it clearly points out the fact that in dealing with the public health, broad discretionary authority may be conferred by the legislature.

94. Fla. Laws 1951, ch. 27438, § 31.

95. *North Broward Hosp. Dist. v. Mizell*, *supra* note 93, at 2, citing art. 6 § 3 of the hospital board's by-laws. (Emphasis added.)

96. In reference to the issue of statutory educational requirements, see *Snedeker v. Vernmar, Ltd.*, 151 So.2d 439 (Fla. 1963) (masseur).

97. See *City Comm'n of City of Fort Pierce v. State ex rel. Altenhoff*, 143 So.2d 879 (Fla. 2d Dist. 1962) (power of a city to fluoridate its water supply).

E. *Safety*

Regulations enacted by virtue of the police power for the purpose of effecting public safety usually do not encounter difficulty when subjected to substantive due process standards.⁹⁸

Florida's Financial Responsibility Act requires that the owner and operator of a vehicle involved in an accident "shall respond for such damages and show proof of financial ability to respond for damages in future accidents as a requisite to his future exercise of such privilege."⁹⁹ The Act provides the method by which financial responsibility can be demonstrated. In *Larson v. Warren*,¹⁰⁰ two cases were consolidated for purposes of the appeal. In one, a driver, after failing to secure a release from the other party involved in an accident, failed to post a cash bond. In the other case, a cash bond was posted and the party then sought to obtain a refund. Employing the reasoning of *Buck v. Bell*,¹⁰¹ and recognizing the dangerous propensities of an automobile, the court validated the statute as an attempt to promote public safety and provide security for those injured in their person or property.

The right to bear arms is protected by a constitutional guarantee¹⁰² but this same constitutional provision authorizes the legislature to prescribe the manner in which they may be borne. Predicated upon this section, a Florida statute which requires a license to carry or be in possession of a gun¹⁰³ was validated.¹⁰⁴

F. *Miscellaneous*

In order to be within the limitations imposed on the exercise of the police power, a prohibition must be reasonably "required as incidental to the accomplishment of the primary purpose of the Act."¹⁰⁵ A statute prohibited the *possession* of spearfishing equipment in a certain portion of Monroe County.¹⁰⁶ In reversing a conviction based upon this statute and invalidating the statute, the supreme court held that although the statute facilitates the effectuation of the primary purpose of the Act (prohibition of spearfishing within the area) and attempts

98. Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 720 (1962).

99. FLA. STAT. § 324.011 (1961).

100. 132 So.2d 177 (Fla. 1961).

101. 274 U.S. 200 (1927). In this case, the United States Supreme Court upheld a statute which provided for the sterilization of mental defectives.

102. FLA. CONST. DECL. OF RIGHTS § 20.

103. FLA. STAT. § 790.05 (1961). FLA. STAT. § 790.06 restricts the issuance of a license to a period of two years and only to persons twenty years of age who possess good moral character.

104. *Davis v. State*, 146 So.2d 892 (Fla. 1962).

105. *Delmonico v. State*, 155 So.2d 368 (Fla. 1963), citing *Caldwell v. Mann*, 157 Fla. 633, 26 So.2d 788 (1946) and *L. Maxcy, Inc. v. Mayo*, 103 Fla. 552, 139 So. 121 (1932).

106. FLA. STAT. § 370.172(3) (1961).

to protect a legitimate public interest, to be valid the "interference with private rights must be justified as a *necessary* means of accomplishing" an objective.¹⁰⁷ When other methods may be employed to accomplish a legitimate end, confiscation of equipment or proscription of its possession exceeds that degree of reasonable interference with private action as is actually necessary to protect the public interest.

IV. PROCEDURAL DUE PROCESS

A. *Administrative Law*

1. HEARING

The State Board of Education was authorized to revoke the certificates of public school teachers¹⁰⁸ upon the charge of misconduct involving moral turpitude. Authority was granted to the board to conduct an investigation to determine whether there was probable cause indicating such misconduct; the investigation was to be made by members of designated professional teachers' organizations. If probable cause was found to exist, a formal hearing would be conducted before a hearing officer who would file with the board a statement of ultimate facts constituting the alleged misconduct.

In *Neal v. Bryant*,¹⁰⁹ three teachers were questioned by an investigator who was employed by the legislative investigating committee. This committee had no connection with the State Board of Education other than an agreement between the chairman of the committee and the State Superintendent of Public Education to the effect that the board would be apprised of the investigator's findings when they concerned public school teachers. Under questioning by the investigator, all three teachers admitted prior participation in homosexual activities. When informed of these activities the board appointed a hearing officer who conducted a hearing after reporting to the board that based upon a review of the investigator's report, there was probable cause to justify revocation of the teachers' certificates. At the conclusion of the hearing, the hearing officer again notified the board that there was sufficient probable cause to justify a revocation. Predicated upon the testimony taken before the hearing officer, the board revoked the teachers' certificates.¹¹⁰

The supreme court vacated the board's action, holding that the provisions regarding a preliminary investigation to determine probable cause were mandatory. This was held to be true particularly in those cases such as that under consideration in which the statute provides

107. *Delmonico v. State*, *supra* note 105, at 370. See also, *Conner v. Sullivan*, 160 So.2d 120 (Fla. 1st Dist. 1963).

108. FLA. STAT. § 229.08(16) (1959).

109. 149 So.2d 529 (Fla. 1962).

110. At the hearings, the only evidence of homosexuality was the admissions made by the teachers to the investigator.

for the deprivation of a property right—which the court construed to include the right to continue in a position in the public schools.

In *City of Miami v. Jervis*,¹¹¹ three policemen were each suspended from duty on a charge of conduct unbecoming an employee. At the hearing, evidence was introduced demonstrating the failure of the policemen to submit to a lie detector test, although one ultimately did submit thereto.¹¹² One member of the civil service board stated that the failure to submit to the test created “somewhat of a presumption in our [the board’s] minds and you cannot argue us out of this presumption,”¹¹³ while another stated that if the officers did not submit to the test, “one has to *surmise* that there are good reasons why you don’t and that doubt remains in our minds as to whether or not you have stated the full and exact reason.”¹¹⁴ The district court of appeal affirmed the lower court’s action is quashing the board’s findings, holding that “no presumption is to be drawn adverse to a person or party because of his failure to submit to a lie detector test.”¹¹⁵

2. TIME OF HEARING

In *Florida State Medical Bd. of Examiners v. James*,¹¹⁶ a licensed doctor was ordered to appear before the Board of Medical Examiners to show cause why his license should not be revoked for procuring a criminal abortion and for immoral or unprofessional conduct. On the afternoon before the hearing, the doctor sought to enjoin the board from proceeding with the hearing on the grounds that a trial was pending on a charge of criminal abortion and that at the hearing before the board he might be forced to give incriminating testimony. An injunction issued by the lower court was reversed on several grounds. First, the agency involved was proceeding within its field of responsibility, in which the courts should not interfere. Second, the complainant had not exhausted his administrative remedies as Florida law requires. Third, a person called before a board in a disciplinary proceeding may seek judicial review of his contention that he had been deprived of due process of law.

3. NOTICE

In *State ex rel. Barancik v. Gates*,¹¹⁷ a registered and qualified elector received a letter from the Supervisor of Registration stating that

111. 139 So.2d 513 (Fla. 3d Dist. 1962).

112. Testimony was introduced to show that in the test, deception was indicated by the emotional responses to certain questions, and therefore, it was assumed that the persons tested were not telling the truth and were criminally involved in the offense listed.

113. *City of Miami v. Jervis*, *supra* note 111, at 515.

114. *Id.* at 516.

115. *Id.* at 517.

116. 158 So.2d 574 (Fla. 3d Dist. 1963).

117. 134 So.2d 497 (Fla. 1961).

pursuant to statutory authority,¹¹⁸ his name had been stricken from the county registration books. The elector was advised that he could apply to the Supervisor for restoration of his name to the books "upon giving good and sufficient proof that [his] name was improperly removed."¹¹⁹ Alleging that the statutes violated his constitutional rights because they failed to provide for notice and opportunity to be heard, the elector sought mandamus to compel the restoration of his name to the books. The trial court upheld the validity of the statutes on the basis that since a person whose name had been stricken from the voters list was given the right to appear and establish the legality of his registration, due process was satisfied. Further, the trial court stated that neither the fourteenth amendment nor section one of the Florida Declaration of Rights were violated because the "*right to vote is not a natural, absolute or vested right of which a person or citizen cannot be deprived without due process of law, but it is a political right as distinguished from a civil right, property right or right of person . . .*"¹²⁰

This decision was reversed by the supreme court, which reiterated the proposition that the very essence of due process is the requirement of notice and opportunity to be heard and to appear *before* judgment is pronounced. "The right to vote and to have one's name remain upon the registration list is a right which transcends property rights,"¹²¹ and one's name may not be stricken from a registration list without previous notice and opportunity to be heard.

4. HEARING EXAMINERS

The Florida Real Estate Commission filed an information against a registered real estate broker charging him with conspiracy to permit an unlicensed individual to operate as a broker or salesman. Upon the broker's answer, the issues were presented to a hearing examiner who found that the commission had failed to establish the conspiracy. However, he found that the broker had violated a different statute in that he had compensated an unlicensed individual in connection with a real estate transaction. After a hearing, the commission found the broker guilty of knowingly working with and receiving a proportionate share of a broker's commission from an unlicensed person, enabling the latter to perform services and receive compensation in violation of the law. On appeal, the broker contended that the examiner found him not guilty of the violation charged in the information, but guilty of a second violation, whereas the commission found him guilty not of the violation

118. FLA. STAT. §§ 98.201 and 101.59 (1959).

119. State *ex rel.* Barancik v. Gates, *supra* note 117, at 498. The elector did attempt to see the supervisor, but no hearing was ever held on the issue.

120. *Ibid.*

121. State *ex rel.* Barancik v. Gates, *supra* note 117, at 499.

found by the examiner but of yet a third type of violation as to which he was not charged in the information.

In rejecting the broker's argument that he had been denied due process of law,¹²² the court held that the variance between the charge in the information and the commission's finding was not material since the facts comprising the transaction were the same and the findings were that the violation was by way of aiding and abetting rather than in furtherance of a conspiracy. Further, the acts must be alleged in concise, simple language and will be deemed sufficient to afford notice of a charge if a person with reasonable understanding would be enabled to present his defense.¹²³ The court stated that the statutes which provide for a hearing examiner make no provision for, nor do they give force and effect to, his findings.

5. APPEALS FROM ADMINISTRATIVE ACTIONS

The Florida Board of Pharmacy promulgated a rule which prohibited advertisement of certain drugs by name or price.¹²⁴ A statute provides that any party aggrieved by a rule of the board may appeal to the appropriate circuit court for review within sixty days of the entry of the board's rule.¹²⁵ The statute was held unconstitutional insofar as it is purported to "restrict the right of an affected party to attack the validity of a quasi-legislative rule which has been entered without notice or hearing."¹²⁶

A deputy commissioner of the Florida Industrial Commission entered an order finding that an employer had violated certain safety regulations adopted by the commission. Section 440.56(8)(a) of the Florida Statutes authorizes an appeal from this type of order to the circuit court and enables an employer to request a "hearing de novo" before the circuit court. The employer filed a notice of appeal with a demand for a jury trial. A motion to strike the demand was denied by the lower court. On appeal, the lower court's action was reversed,¹²⁷ the district court holding that neither the federal¹²⁸ nor state constitutional¹²⁹ guarantees of trial by jury give the employer the right to trial

122. *Thorn v. Florida Real Estate Comm'n*, 146 So.2d 907 (Fla. 2d Dist. 1962).

123. "[B]oth the information and answer shall be aided and deemed amended by proof if the opposite party shall be afforded full opportunity to meet and defend against or rebut such proof." *Id.* at 909.

124. See notes 91 and 92 *supra* and accompanying text.

125. FLA. STAT. § 465.20 (1961).

126. *Stadnik v. Shell's City, Inc.*, 140 So.2d 871, 873 (Fla. 1962). The court distinguished this case from a situation in which a quasi-judicial order might be entered after notice and hearing.

127. *Florida Industrial Comm'n v. Mason*, 151 So.2d 874 (Fla. 1st Dist. 1963).

128. U.S. CONST. amend. VII.

129. FLA. CONST. DECL. OF RIGHTS § 3: "The right to trial by jury shall be secured to all, and remain inviolate forever." FLA. CONST. DECL. OF RIGHTS § 11: "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury"

by jury in the instant proceeding. " '(R)ights unknown to the common-law procedure of trial by jury may be created and provision made for their determination in the absence of a jury without violating the constitutional provision for trial by jury.' "¹³⁰

B. *Compulsory Process*

Section 11 of the Florida Declaration of Rights provides that "In all criminal prosecutions, the accused shall have the right to . . . compulsory process for the attendance of witnesses in his favor" In *Bowden v. State*,¹³¹ a father was convicted of incest when the complaining witness (the defendant's daughter) stated that he was the father of a child to whom she had given birth. The trial court denied the defendant's motion requesting that blood grouping tests be administered to the complaining witness and her child. The purpose of the defendant's motion was to impeach the veracity of the complaining witness through the use of the tests. The district court of appeal affirmed the lower court's ruling, holding that the power to order blood grouping tests exists inherently and may be exercised in the sound discretion of the court. In *Bowden*, since the issue of paternity was not the critical question in the incest prosecution, the appellate court held that the trial court did not abuse its discretion, and that the decision did not deprive the defendant of compulsory process or due process of law.¹³²

V. EQUAL PROTECTION

Section 1 of the Florida Declaration of Rights states that "all men are equal before the law" ¹³³ In determining the validity of a legislative classification, the test to be met, as in the case of issues arising under substantive due process, is that the legislative action must be "reasonable."¹³⁴

A. *Racial or Religious Problems*

Section 798.05 of the Florida Statutes provides as follows:

Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each

130. *Florida Industrial Comm'n v. Mason*, *supra* note 127, at 876, citing *Florida East Coast Ry. v. State*, 77 Fla. 571, 82 So. 136 (1919).

131. 137 So.2d 621 (Fla. 2d Dist. 1962).

132. The court clearly indicated that if the results of the blood test would be determinative of the issue before the court, then the action of the court would have constituted an abuse of discretion. See *State v. Lampp*, 155 So.2d 10 (Fla. 2d Dist. 1963).

133. In most cases in which this provision is raised, reliance is also placed on the equal protection clause in the fourteenth amendment.

134. See *West Flagler Kennel Club, Inc. v. Florida Racing Comm'n*, 153 So.2d 5 (Fla. 1963), which deals with a classification established in a special act of the legislature, in addition to dealing with the general requirements of classifications.

be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.

In *McLaughlin v. State*,¹³⁵ a Negro man and white woman were convicted under this statute. The defendants argued that the statute denied to them the equal protection of the laws for two reasons. First, the statute constituted a specific proscription of cohabitation solely for persons who are of different races¹³⁶ and second, even if this statute were equated with the general fornication statute, higher penalties were imposed on persons of different races than persons of the same race who commit the same act. On the authority of the decision of the United States Supreme Court in *Pace v. Alabama*,¹³⁷ the Florida Supreme Court held that the statute did not violate the equal protection clauses since the statutory " 'punishment of each offending person, whether black or white, is the same.' "¹³⁸ *McLaughlin* subsequently was reversed by the United States Supreme Court.^{138a}

B. Other Problems in Equal Protection

1. CONGRESSIONAL REAPPORTIONMENT

In *Lund v. Mathas*,¹³⁹ an action was brought to declare the Congressional Reapportionment Act¹⁴⁰ unconstitutional. The complaint alleged that by virtue of the arbitrary and unreasonable redistricting provided by the Act, the plaintiffs had suffered a debasement of their vote and consequently had been denied due process and the equal protection of the law.¹⁴¹ According to the 1960 census, the difference in population between the most and least populous of the twelve congressional districts established by the Act was in excess of 323 thousand people. Each of three districts had a population lower than that of the plaintiffs' district, and eight exceeded it. Despite this disparity in population, the Florida

135. 153 So.2d 1 (Fla. 1963).

136. There is no Florida statute which prohibits cohabitation of persons of the same race. FLA. STAT. § 798.03 (1963) proscribes fornication by a "man" with a "woman." Violation is punished by imprisonment not exceeding three months or by a fine not exceeding thirty dollars. FLA. STAT. § 798.04 (1963) proscribes fornication committed by "any white person and negro or mulatto." Violation is punished by imprisonment not exceeding twelve months or a fine not exceeding one thousand dollars.

137. 106 U.S. 583 (1883).

138. *McLaughlin v. State*, *supra* note 135, at 2, quoting from *Pace v. Alabama*, *supra* note 137, at 585. On this basis, the court found no discrimination between the races. The United States Supreme Court noted probable jurisdiction and placed the case on the summary calendar, 377 U.S. 914 (1964), although the case was subsequently removed from the summary calendar on the appellant's motion. 377 U.S. 974 (1964). See *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948), which is a landmark case dealing with the problem of miscegenation.

138a. *McLaughlin v. State*, 85 Sup. Ct. 283 (1964).

139. 145 So.2d 871 (Fla. 1962).

140. FLA. STAT. § 8.01 (1961).

141. The plaintiff alleged a violation of FLA. CONST. art. 7, §§ 3 and 4, and U.S. CONST. amend. XIV, § 2.

Supreme Court held that "it does not appear that the appellants have suffered any discrimination."¹⁴² The court explained that neither the federal nor state constitutions or statutes require that congressional districts be apportioned on a basis of numerical equality, and that population is only one of several important factors to be considered in apportionment.¹⁴³

The effect of the court's decision in this case was mitigated, to say the least, by the subsequent decision of the United States Supreme Court in *Wesberry v. Sanders*,¹⁴⁴ in which the court held that:

the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.¹⁴⁵

2. LEGISLATIVE REAPPORTIONMENT

A federal district court held that the Florida constitutional and statutory provisions relating to the apportionment of both houses of the Florida legislature were invidiously discriminatory so as to deny the plaintiffs the equal protection of the law.¹⁴⁶ The court declared the provisions prospectively null, void and inoperative.

After this decision, the Florida legislature passed a proposed constitutional amendment which was to be submitted to the electorate. Although the proposal did not provide for apportionment on a strict population basis, the federal district court held that the proposal, if ratified, would provide a "rational plan of reapportionment free from invidious discrimination."¹⁴⁷ Only if the plan were invidious or without rationality would it be in violation of the equal protection clause of the fourteenth amendment, and in determining this rationality, a number of factors in addition to population must be considered. At the following election, the proposed amendment was not ratified.

Subsequent to this election, the legislature convened twice in extra sessions. In its first session, it failed to effect a plan of reapportionment. However, in the second session, a bill passed by the Florida senate provided for reapportionment of the senate by *statutory* means.

142. *Lund v. Mathas*, *supra* note 139, at 823.

143. Other factors to be considered are topography, geography, means of transportation and industrial, agricultural and resort activities together with other regional considerations.

144. 84 Sup. Ct. 526 (1964).

145. *Id.* at 530.

While it may not be possible to draw congressional districts with mathematical precision, that it is no excuse for ignoring our Constitutions plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. *Id.* at 535.

146. *Sobel v. Adams*, 208 F. Supp. 319 (S.D. Fla. 1962). The court pointed out that a representative from Dade County represented 311,000 people whereas a representative from Gilchrist, the least populous county, represented 2,868 people.

147. *Id.* at 324.

This proposed plan of reapportionment was in conflict with article VII of the Florida Constitution; in view of this conflict, the Governor sought an advisory opinion from the Florida Supreme Court.¹⁴⁸ The court referred to the language of the district court, which had declared the provisions of the Florida Constitution and statutes relating to apportionment to be null, void and inoperative and in addition, to the district court's reference to reapportionment by legislation. Predicated upon the district court's opinion, the Florida Supreme Court held that the limitation on the size of the state senate and house had been eliminated and, therefore, the Governor could call the legislature into extra session until it enacted a bill which was in accord with the fourteenth amendment.

VI. LEGISLATION AND THE CONSTITUTION

A. Article III, Section 16

This constitutional provision provides that:

Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only; but in such case the act as revised or section, or subsection of a section . . . as amended, shall be reenacted and published

Lipe v. City of Miami,¹⁴⁹ concerned the provision relating to the publication of the amended or revised legislation. The city charter arranged civil service positions in two categories, classified and unclassified. Employees in the latter class could be removed at the pleasure of the city manager whereas those in the former class could be removed by the city manager only after the employee received a written statement containing the reasons for his removal and an opportunity to be heard. The plaintiff's position had been classified, but a 1955 special act attempted to place it in the unclassified status.¹⁵⁰ The act purported to add to existing legislation a new subparagraph whose contents were included in the special act. However, the act did not include the section which was being amended, and on that basis the court held the act to be violative of the constitution. "If the statutory enactment is complete and intelligible in itself without reference to the act it purports to amend, Article III, Section 16 . . . is satisfied."¹⁵¹ The provision relating to publishing an amended or revised act at length is mandatory

148. *In re* Advisory Opinion, 150 So.2d 721 (Fla. 1963).

149. 141 So.2d 738 (Fla. 1962).

150. Fla. Laws 1955, ch. 31001.

151. *Lipe v. City of Miami*, *supra* note 149, at 743.

with its purpose being to enable the legislature to see and understand the revised legislation.¹⁵²

In *County of Hillsborough v. Price*,¹⁵³ an act was held to be violative of the "title" requirements of Article III, Section 16. The title of Chapter 61-2242, Laws of Florida, 1961, reads as follows: "AN ACT authorizing the impounding officers of Hillsborough County to dispose of stray untagged vicious dogs" The provisions of the act dealt with any dog found to be vicious and sought to apply to dogs that were wearing tags. These provisions which were beyond the subject of the act, as expressed in the title, were held to be inoperative "since the general public would not be put upon notice of the contents of the Act from a reading of the title."¹⁵⁴

B. Article III, Section 20

In a habeas corpus proceeding, the legality of detention under an indictment was questioned. The petitioner asserted that what was once a general law dealing with the empanelling of grand juries had become a local law connected with a matter which could be the subject only of a general law. A 1949 act¹⁵⁵ provided that in counties having a population in excess of 315,000, the grand jury shall consist of 23 jurors. Later, the population figure was lowered to 225,000.¹⁵⁶ In 1961, a series of five local laws removed five counties from the operation of these population acts. In addition, a general law removed a remaining county from the operation of the two prior acts.¹⁵⁷ Since Dade County was the only county subject to the prior acts, the petitioner contended that the general laws had become, in legal effect, local laws in violation of Article III, Section 20.¹⁵⁸

The supreme court rejected his contention, holding that although the original two acts presently would be applicable only to Dade County, other counties, based on the preceding official census, could be within their operation when they attained the designated population.¹⁵⁹ Because there were other counties which were potentially within the population bracket, the rule that "within reasonable limits the Legislature may

152. See also, *Auto Owners Ins. Co. v. Hillsborough County Aviation Authority*, 153 So.2d 722 (Fla. 1963).

153. 149 So.2d 912 (Fla. 2d Dist. 1963).

154. *Id.* at 915. See, Alloway & Knight, *Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 738 (1962) for a discussion of the purposes of this provision.

155. Fla. Laws 1949, ch. 25554.

156. Fla. Laws 1951, ch. 26664.

157. Fla. Laws 1951, ch. 61-577, provided that as to counties with a population of not less than 350,000 inhabitants and not more than 385,000, chapters 25554 and 26664, *supra* notes 155 and 156, were repealed.

158. FLA. CONST. art. 3, § 21 was also in issue.

159. *Yoo Kun Wha v. Kelly*, 154 So.2d 161 (Fla. 1963). The acts would be applicable to counties with a population of not less than 225,000 nor more than 349,999, and not less than 385,000 inhabitants.

death, his widow would receive a monthly pension of seventy-five per cent of the amount the employee received. After the employee's retirement, but before his death, the legislature amended the pension plan law. Although the amendment provided that pensions payable to retired employees were to be continued without adjustment during the employee's lifetime, it further provided that the *contingent* benefits due a widow would not accrue to her unless the retired employee elected to accept a reduced retirement benefit during his lifetime and a reduced benefit to his widow. The employee in the *O'Donald* case made no election and continued to receive the same benefits he had been receiving prior to the amendment. Upon the employee's death, the city refused to pay any benefits to his widow. It claimed that the widow's rights were terminated by her husband's failure to accept the provisions of the amendment to the pension plan. The supreme court held that at the time of his retirement, the employee acquired "a vested right of contract in all benefits conferred upon him by the law then in effect."¹⁶⁶ "[T]he right of the widow vested simultaneously with that of her husband and was not impaired by the amendatory act."¹⁶⁷

In another case, a city entered into a thirty-year franchise agreement with a private utility company; the agreement reserved to the city the authority to determine the reasonableness of the rates to be charged. Subsequently, the legislature authorized the Public Utilities Commission to regulate the rates charged by water and sewer companies.¹⁶⁸ The Florida Supreme Court rejected the city's contention that the legislation contravened its constitutional protection. Under the Florida Constitution,¹⁶⁹ the legislature is vested with the power to regulate utility rates; although a municipality may assert this power until the legislature elects to do so, all contracts entered into pursuant to the municipality's exercise of power are subject to the inherent power of the state to alter the contract relating to rates when it deems it appropriate to act. "[T]he constitutional rule against impairment does not apply to a contract of the nature now under consideration . . . because a municipality cannot foreclose the exercise of the state's police power by such an arrangement."¹⁷⁰

166. *State ex rel. City of Jacksonville Beach v. O'Donald*, 151 So.2d 430, 432 (Fla. 1963). The district court of appeal had distinguished the rights which accrued under pension plans on the basis of whether the membership was mandatory or voluntary. However, the supreme court did not distinguish mandatory and voluntary plans, indicating that the distinction may no longer be valid.

167. *Id.* at 433. Throughout the supreme court and district court opinions, reference was made to the purposes of the pension plans, *viz.*, to secure protection for employees, to retain qualified personnel in government and to contribute to efficiency in government.

168. FLA. STAT. § 367 (1963).

169. FLA. CONST. art. 16, § 30.

170. *City of Plantation v. Util. Operating Co.*, 156 So.2d 842, 843 (Fla. 1963). See also, *State v. Dade County*, 142 So.2d 79 (Fla. 1962).